1993

David J. Woodcock v. John Crandall : Reply Brief

Utah Court of Appeals

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IN THE CIRCUIT COURT OF APPEALS OF THE STATE OF UTAH

DAVID J. WOODCOCK,	:	
PLAINTIFF/APPELLEE,	:	REPLY BRIEF OF APPELLANT
vs.	:	
JOHN CRANDALL,	:	CASE NO. 930288-CA
DEFENDANT/APPELLANT.	:	PRIORITY 15

Appeal from the Judgment of the Third Judicial District Court
in and for Summit County, State of Utah
The Honorable Frank G. Noel

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DAVID J. WOODCOCK,	:	
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vs.	:	
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§78-36-10 Judgment for restitution, damages and rent-Immediate enforcement- Treble damages

(1) A judgment may be entered upon the merits or upon default. A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises. If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.

(2) The jury or court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

(a) forcible entry;

(b) forcible or unlawful detainer;

(c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial; and

(d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Section 2(a) through 2(c), and for reasonable attorney's fees, if they are provided for in the lease or agreement.

(4) If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately.

Rule 4-501 Motions. (Utah Code of Judicial Administration)

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all district and circuit courts except proceedings before the court commissioners and the small claims department of the circuit court. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) Filing and Service of Motions and Memoranda.

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits, or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided for in paragraph 1(d) of this rule.

(c) **Reply Memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) Motions for summary judgment.

(a) **Memorandum in support of a motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences in the movant's statement that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall

be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraph (3)(a) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for a hearing is denied, the court shall notify the requesting party. When a request for a hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be hears after that date without leave of the Court.

(4) Expedited dispositions. Upon motion and notice and for good cause shown, the court may grant a request for expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone conferences. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearances. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

Rule 4-504 Written orders, judgments and decrees. (Utah Code of

Judicial Administration).

Intent:

To establish a uniform procedure for submitting written orders, judgments and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such services shall be filed with the court. All judgments, orders and decrees, or copies thereof, which are transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel, or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or last known address of the judgment debtor and he social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made part of the document containing the stipulation or motion upon which the order is based.

(8) No orders, judgments or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach a copy of all previous judgments based upon the same written obligation.

(10) Nothing in this chapter shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

Rule 4-506 Withdrawal of counsel in civil cases. (Utah Code of Judicial Administration)

Intent:

To establish a uniform procedure and criteria for withdrawal of counsel in civil cases.

Applicability:

This rule shall apply to all counsel in civil proceedings in trial courts of record except guardians ad litem and court-appointed counsel.

Statement of the Rule:

(1) Consistent with the Rules of Profession Conduct, an attorney may withdraw as counsel of record without the approval of the court except when (a) a motion has been filed and is pending before the court or (b) a certificate of readiness for trial has been filed. Under these circumstances, an attorney may not withdraw except upon motion and order of the court.

(2) When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney and upon all other parties not in default and a certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal served upon the client shall include notification of the trial date.

(3) When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, opposing counsel must notify, in writing, the unrepresented client of his/her responsibility to retain another attorney or appear in person before opposing counsel can initiate further proceedings against the client. A copy of the written notice shall be filed with the court and no further proceedings shall be held in the matter until 20 days have elapsed from the date of filing.

Rule 24. Briefs. (Utah Rules of Appellate Procedure).

(a) **Brief of Appellant.** The brief of the appellant shall

contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceedings in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review and the standard of appellate review with supporting authority for each issue.

(6) Constitutional provisions, statutes, ordinances, rules and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citations. If the pertinent part of the provision is lengthy, the citation alone will suffice, and in that event, the provision shall be set forth as provided in paragraph (f) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(b) **Brief of Appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that a statement of the issues presented need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) **Reply Brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross appealed, the appellee may file a brief in reply to the response of the appellant on the issues presented on cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (6), (9) and (1) of this rule. No further briefs may be filed except with leave of the

court.

(d) **References in briefs to the parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to the parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower courts or in the agency proceedings, or the actual names of the parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered and received or rejected.

(f) **Reproductions of statutes, rules, regulations, documents, etc.** If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(6) of this rule, they shall be reproduced in the brief, or in an addendum at the end, or they may be supplied to the court in pamphlet form. Copies of those parts of the record on appeal that are of central importance to the determination of the appeal (e.g. the challenged instructions, findings of fact and conclusions of law, memorandum decision, the contract or document subject to construction,etc.) shall be included in the addendum.

(g) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (f) of this rule.

(h) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule, and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant.

(i) **Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) **Citations of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An

original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any responses shall be made within 7 days of filing and shall be similarly limited.

(k) **Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(l) **Brief covers.** The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

ARGUMENT

A. Crandall's Brief Complies with Rule 24 of the Utah Rules of Appellate Procedure because it concisely lays out the issues for review, the standards applicable to each issue and the relief sought on appeal.

Crandall's brief clearly complies with Rule 24 of the Utah Rules of Appellate Procedure. Crandall's brief concisely presents the issues for review on appeal. (Appellant's Brief pages 1, 2). Crandall's brief correctly states the standard of review this court should apply with respect to each issue. (Appellant's Brief pages 1,2). Finally, Crandall's brief clearly states the relief sought from this court. (Appellant's Brief pages 8, 9, 13, 15, 18, 20, 21, and 22). Thus, this Court must consider Crandall's Brief in rendering its decision on these matters.

Crandall's brief contains concise statements of the issues for review. Rule 24(a)(5) and (9) of the Utah Rules of Appellate Procedure state

> (5) A statement of the issues presented for review and the standard of appellate review with supporting authority for each issue.
> (9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes and parts of the record relied on.

Rule 24(a)(5) and (9), Ut. R. App. P. (1993). Crandall's brief clearly meets the requirements of both Rule 24(a)(5) and (9) of the Utah Rules of Appellate Procedure.

Crandall's brief contains a brief statement of the issues presented and the standards for appellate review. (See Appellant's brief pages 1, 2). Additionally, the brief contains

an argument section which contains both the contentions and reasons of the appellant combined with citations to the relevant authority in support thereof. (See Appellant's Brief pages 10-22).

Crandall's brief does not possess the characteristics which warrant dismissing the brief on either Woodcock's motion or sua sponte pursuant Rule 24(k) of the Utah Rules of Appellate Procedure. Rule 24(k) of the Utah Rules of Appellate Procedure states

> All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Rule 24(k), Ut. R. App. P. (1993). In State v. Yates, 834 P.2d 599, 602 (Utah App. 1992), this Court stated that a brief was insufficient where the issues listed "do not correlate with the substance of the brief." In the present case, it is clear that issues presented in Crandall's brief directly "correlate with the substance of the brief." Therefore, the issues presented satisfy this Court's criteria for meeting the requirements of Rule 24. Additionally, in Yates, the court stated that the argument section of the brief was insufficient because the "brief contains no authority and contains no meaningful analysis as to this argument." Yates at 602. Crandall's brief contains both authority and meaningful analysis in support of his contentions. Thus, Crandall's brief satisfies the requirements of Rule 24 of

the Appellate Rules of Procedure and therefore this Court must consider Crandall's brief in determining the issues presented and briefed therein.

B. Woodcock's submission of the judgment to the court for signing prior to presenting the judgment to Crandall violated Rule 4-504 of the Utah Code of Judicial Administration.

Woodcock violated Rule 4-504 of the Utah Code of Judicial Administration when it submitted the judgment to the court for signing without first presenting the judgment to Crandall. Rule 4-504 of the Utah Code of Judicial Administration in the relevant portion states

> **Intent:**
>
> To establish a uniform procedure for submitting written orders, judgments and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.
>
> **Applicability:**
>
> This rule shall be applicable to all civil proceedings in courts of record except small claims.
>
> **Statement of the Rule:**
>
> (1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.
> (2) Copies of the proposed findings, judgment and orders **shall be served upon opposing counsel before being presented to the court** for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

Rule 4-504, Ut. C.J.A. (1993)(emphasis added).

Woodcock violated Rule 4-504 because he did not first submit the judgment to Crandall as required by the rule. While

Woodcock's assertion that the rule contains an exception under which a judge may order the immediate issuance of the judgment, Woodcock is incorrect in his assertion that the judge did so in this case. In the present case, Woodcock's Motion for Summary Judgment was heard at a Hearing scheduled for November 23, 1992. (R. 000259). At that hearing, the judge granted Woodcock's Motion for Summary Judgment as reflected in the clerk's minute entry. (R. 000264). In that minute entry, the court states that "Mr. Anderson to prepare order." (R. 000264). However, there is nothing in the terms of the minute entry which states that the judgment was to be effective immediately upon the ruling of the court and that the requirements of Rule 4-504 had been suspended.

It is Crandall's position that Woodcock's attorney prepared the judgment pursuant to the minute entry but included wording, amounts, and orders which Crandall suggests went beyond the ruling of the Court and to which he would have objected if given the opportunity afforded by the rules. The judgment is largely in conformity with the relief sought in Woodcock's Motion for Summary Judgment but goes beyond what Crandall believes was ruled by the Court from the bench and is clearly more than is set forth in the Minute Entry. Nonetheless, Woodcock submitted the judgment to the judge for his signature without first submitting the judgment to Crandall. This is in direct violation of Rule 4-504 which mandates that copies of the proposed judgment "be served upon opposing counsel **before being submitted to the court for signature**." Rule 4-504, Ut C.J.A. (1993)(emphasis added).

Woodcock argues that his apparent violation of Rule 4-504 is excused by the provisions of §78-36-10(4), U.C.A. (1993). Appellant disagrees. This section, in relevant part, states

> If the proceeding is for unlawful detainer after default in the payment of rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment **may** be issued and enforced immediately.

§78-36-10(4), U.C.A. (1993)(emphasis added). This section provides for the court to exercise its discretion in issuing an immediate judgment. In this case, the court did not so exercise its discretion. Rather, Woodcock, in preparing the order and judgment, exercised his discretion in presenting what he wanted included in the order without serving the judgment on Crandall. Section 78-36-10(4) gives the court power to act quickly but this language is not a blanket excuse for not complying with the provisions of Rule 4-504 absent clear direction to do so by the court. Because the court did nothing more than issue a minute entry requiring Woodcock to prepare an order for the court's signature, and did not otherwise direct, Woodcock was required by the mandatory provisions of Rule 4-504 to first serve the proposed judgment on Crandall. Having not done so, Woodcock violated Rule 4-504 and the judgment should be vacated.

C. Woodcock violated Rule 4-506 by failing to wait twenty days after serving a Notice to Appear or Appoint Counsel before initiating additional proceedings against Crandall.

Rule 4-506 is clearly a rule of equity designed to protect the unrepresented party from the potentially harsh consequences which might arise by attorneys whose skill outmatches a lay individual that is temporarily unrepresented. The obvious

purpose of the rule is to permit the unrepresented party a reasonable "time-out" period to obtain new counsel during which period of time no action in the case is permitted. When Woodcock filed his expansive Motion for Summary Judgment without waiting the twenty days required by the rule, he violated not only the letter of the rules, but the spirit and intent as well. He forced Crandall, prematurely, and at great disadvantage, into a futile and ill-fated effort to find counsel who could drop everything and respond on extremely short notice to what was clearly a massive effort to summarily dispose of a very contested and complex matter. Clearly, that is the very disadvantage the rules seeks to protect against.

Woodcock erroneously argues that the statute should be read to permit a party to initiate proceedings at anytime following the service of the notice required by Rule 4-506. This argument, if adopted, would undermine the very purpose of the rule. The rule is designed to protect the unrepresented party. An unrepresented party who has submitted themselves to the jurisdiction of the court becomes a pro se litigant only after the expiration of the "time-out" period if other counsel is not retained. To serve the motion when no counsel is present forces Crandall to be a pro se litigant earlier than the rule allows. Crandall was forced to be a pro se litigant in this case at the time the Motion for Summary Judgment was filed. In Nelson v. Jacobsen, the Utah Supreme Court addressed the latitude that should be extended to pro se litigants,

> As a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar. [citations omitted]. At the same time, we have also cautioned that "because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged.

Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983) citing to Heathman v. Hatch, 13 Utah 2d at 268, 373 P.2d at 991.

Neither Woodcock nor the trial court accorded Crandall every consideration that may reasonably be indulged. Crandall's counsel filed a notice of withdrawal on October 26, 1992. (R. 000089-000090). Woodcock filed a Notice to Obtain Counsel or Appear in Person on October 27, 1992. (R. 000091-000092). Fourteen days later, on November 10, 1992, Woodcock filed a Motion for Summary Judgment. (R. 000135-000138). A reasonable interpretation which effectuates the purposes of Rule 4-506 required Woodcock to wait until at least November 16, 1992 before filing his Motion for Summary Judgment. Thus, Woodcock did not accord Crandall the reasonable consideration his status as a pro se litigant would require if the court follows Nelson v. Jacobsen.

The trial court did not accord Crandall every consideration either. On the day of the hearing, Crandall requested a continuation to find new counsel who could effectively respond to the Motion for Summary Judgment. The trial court denied the request for a continuation. In light of the fact that the Motion for Summary Judgment is the equivalent of a proceeding which was filed less than twenty days after filing a Notice to Obtain

Counsel or Appear in Person, this can hardly be considered indulging Crandall, as a pro se litigant, every reasonable consideration.

Woodcock's counsel's actions violated not only the express wording of Rule 4-506, but the underlying spirit and purpose as well. By failing to abide by this rule, neither Woodcock nor the trial court accorded Crandall every reasonable consideration which should be accorded a pro se litigant. Therefore, since the standard set by this court was not followed, this court should vacate the judgment below.

D. The trial court erred in granting Summary Judgment because there are genuine issues of material fact which preclude the granting of Summary Judgment.

The trial court erred in granting Summary Judgment because there are genuine issues of material fact which make granting summary judgment improper in this case. Crandall presented ample and sufficient evidence of contested material fact to preclude summary judgment. Therefore, this court should reverse the trial court's grant of summary judgment.

Crandall created a genuine issue of material fact through his affidavit filed in opposition of Woodcock's Motion for Summary Judgment. Specifically, Crandall refutes the alleged existence of an oral lease agreement between the parties and denies the existence of a tenancy. (R. 000262). Crandall specifically denies that the parties agreement in any way contemplated the payment of taxes in the periodic payments. (R. 000262). Crandall's affidavit restates his consistently

maintained position found in all the depositions that he and Woodcock were joint venturers in the building and not landlord and tenant. When Crandall's affidavit raised these genuine issues of material fact the trial court should not have granted summary judgment in this case.

Woodcock's assertions concerning the statute of frauds and part performance should not be considered on appeal. First, Woodcock failed to raise these issues below and therefore this court should not consider them for the first time now on appeal. Second, and perhaps more importantly, there are genuine issues of material fact with respect to whether Crandall partially performed the verbal joint venture agreement thus taking the contract out of the statute of frauds. These questions arise in the context of the scope and content of the original agreement with respect to both the purchase and Crandall's possession of the property which have been discussed above. Because questions of the statute of frauds and part performance have not been considered below, this court should not address them now for the first time on appeal either as new issues or as make weight arguments to support what the trial court did below. Moreover, the question of whether Crandall has partially performed or not, which would act to take the verbal contract out of the purview of the statute of frauds, requires a complete and thorough understanding of both the agreement to purchase and the facts surrounding Defendant's possession of the property, and all of these facts are unarguably in dispute. With these fact issues

properly (if not artfully) framed before the court, summary judgment is inappropriate. This court should reverse the trial courts grant of summary judgment and remand the case for trial.

Crandall's failure to submit an opposing memoranda should not result in Woodcock's statement of facts being deemed as true under Rule 4-501(2)(b). Rule 4-501(2)(b) in the relevant part states

> All material facts set forth in the movants statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statements.

Rule 4-501(2)(b), Ut. C.J.A. (1993). Crandall specifically denied many of Woodcock's statement of facts in his affidavit and therefore Woodcock's assertion that his Statement of Facts should be deemed admitted is erroneous. Woodcock further erroneously asserts that Crandall's failure to submit a memorandum in opposition to Woodcock's Motion for Summary Judgment is sufficient to deem Woodcock's statement of facts as true. Rule 4-501 does not require a party to file an opposing memorandum. The rule only requires that the opposing party specifically controvert the statement of facts. Crandall's affidavit is sufficient to meet the requirements of Rule 4-501. Thus, because Woodcock's statement of facts cannot be deemed true and because Crandall's affidavit creates genuine issues of material fact, the trial court erred in granting Woodcock's Motion for Summary Judgment.

Woodcock wishes to deny Crandall's right to use depositions

in support of his appellate brief while at the same time using the depositions in support of his motion for summary judgment. In his brief, Woodcock asserts that under the rule of law presented in Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169 (Utah 1991), that the court may not consider on appeal deposition which are not before the court below. While this is an accurate statement of the law, it is one which should apply to both parties. Woodcock wishes to preclude Crandall's use of depositions which were not before the court below while at the same time utilizing the deposition for its own purposes. The record below is devoid of any reference to a motion to publish the depositions. In fact, the depositions were never published or in any way properly brought before the court below. Nonetheless, Woodcock relied heavily on the depositions in support of his Motion for Summary Judgment and now on appeal. Woodcock should not be permitted to have it both ways. Either both parties should be permitted to use the depositions or both parties should be precluded from using the depositions. This court should disregard Woodcock's argument that Crandall may not use the depositions because Woodcock himself is using depositions which were not properly before the court below. Moreover, the depositions when viewed in full context, as opposed to the excerpts selected by Woodcock's counsel, clearly demonstrate the existence of the material facts in dispute.

Crandall has raised genuine issues of material fact. Crandall's affidavit is a part of the record and raises genuine

issues of material fact as to the oral agreement between the parties both as to the joint venture and the right of possession. Thus, the trial court erred in granting Summary Judgment as a matter of law.

CONCLUSION

Crandall's brief is concise. It clearly states the issues for review and the standards. Woodcock violated Rules 4-504 and Rule 4-506 of the Utah Code of Judicial Administration. Woodcock violated Rule 4-504 by failing to first submit the judgment to Crandall before submitting the judgment to the trial court for its signature. Woodcock violated Rule 4-506 by filing his Motion for Summary Judgment without waiting twenty days after serving Crandall with a Notice to Obtain Counsel or Appear in Person. Moreover, Woodcock violated the common sense notions of fairness by attempting to gain an advantage over Crandall who was reduced to the status of a pro se litigant at the time Woodcock filed his Motion for Summary Judgment. Finally, the trial court erred as a matter of law in granting Woodcock's Motion for Summary Judgment because there are genuine issues of material fact which preclude granting summary judgment. Because of all of the errors mentioned above, this court should vacate the trial court's judgment and remand the case to be tried on the merits.

RESPECTFULLY SUBMITTED this 12 day of August, 1993.

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CERTIFICATE OF SERVICE

On this 13 day of August, 1993, I hereby caused to be mailed via first class United States mail, postage prepaid, two copies of the foregoing Appellant's Reply Brief to:

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